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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Amendment of Section 73.202(b),) MM Docket No. 95-83
Table of Allotments,) RM-8634
FM Broadcast Stations.)
(Littlefield, Wolfforth and)
and Tahoka, Texas))

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 12, 1997

Released: March 21, 1997

By the Chief, Allocations Branch:

1. At the request of 21st Century Radio Ventures, Inc. ("21st Century"), permittee of Station KAIQ(FM), Channel 238C3, Littlefield, Texas, the Commission has before it the Notice of Proposed Rule Making ("Notice"), 10 FCC Rcd 6598 (1995), and Request for Supplemental Information ("RSI"), 11 FCC Rcd 5770 (1996) in this proceeding. Pursuant to the request of 21st Century, the Commission issued the Notice proposing the reallocation of Channel 238C3 from Littlefield to Wolfforth, Texas, and the modification of Station KAIQ(FM)'s construction permit to specify Wolfforth as its community of license. To accommodate this reallocation, the Notice also proposed to delete vacant Channel 237A at Tahoka, Texas, or to substitute Channel 278A for Channel 237A at Tahoka. 21st Century filed comments reaffirming its intention to apply for the channel, if allotted.¹ Emil Macha ("Macha"), licensee of KZZN(AM), Littlefield, Texas, filed comments.² Reply comments were filed by Lee. W. Shubert, Trustee, ("Shubert"), licensee of Station KLLL(FM), Lubbock, Texas.³ In response to the RSI, comments were filed

¹ As stated in the Notice, 21st Century's request, although signed, failed to include an affidavit verifying the statements contained in its petition, as required by Section 1.52 of the Commission's Rules. Petitioner was requested to correct this deficiency in its responsive comments and has complied accordingly by filing an affidavit.

² Macha's counsel also filed an errata to Macha's initial comments noting that it had filed comments bearing a facsimile signature. We will accept the errata since it serves to supply an original signature page of Macha's "Certification."

³ 21st Century filed a motion to dismiss Shubert's reply comments, arguing that the reply comments were unacceptable because they dealt only with issues responsive to the Notice. It maintains that Shubert's reply comments must be limited to the issues raised in the comments pursuant to Section 1.415 (c) of the Commission's

by 21st Century, Shubert and Rick McWhorter, Mayor of the City of Wolfforth.⁴

2. Macha filed comments urging the Commission to allot Channel 240C3 to Littlefield, in the event it adopts 21st Century's change of community proposal to reallocate Channel 238C3 from Littlefield to Wolfforth, Texas. Macha states that Littlefield is an incorporated community which includes 6,489 residents who are governed by their own elected city council and mayor. Macha submits that the reallocation of Channel 238C3 to Wolfforth would exclude 17,638 people in the Littlefield area who would have been serviced by Channel 238C3. However, he maintains that number could be reduced to just 675 people if the Commission substitutes Channel 240C3 for Channel 238C3 at Littlefield. Macha states that the allotment of Channel 240C3 to Littlefield would prevent the community from being stripped of its only FM allotment and he intends to apply for Channel 240C3, if allotted.

3. Shubert filed reply comments, noting that 21st Century filed an application for a construction permit for a Littlefield facility in July 1993, which was granted in May of 1994. He states that 21st Century has not constructed its station at Littlefield and believes it has no intention of doing so. He also contends that Macha's newfound expression of interest merits little weight. Shubert argues that absent showing a valid basis for delay, the Commission has required 21st Century to initiate FM service to Littlefield by November 1995. Shubert argues that Macha was nowhere in sight during the five years after the FM allotment to Littlefield was adopted and before 21st Century's application for a construction permit. He contends to permit 21st Century to abandon the allotment at Littlefield in favor of Macha's speculative possibility for local service would clearly disserve the public interest.

4. Following the submission of comments in this proceeding, we issued a RSI, requesting 21st Century to submit information demonstrating that Wolfforth is deserving of a first local service preference. We stated in the RSI that we had reexamined our policy regarding reallocation proposals that involved a station seeking to reallocate its channel from a rural

Rules. We disagree with 21st Century's contention that Shubert's reply comments are unacceptable. In this case, Shubert filed reply comments that dealt with issues that were raised in 21st Century comments. In those comments, 21st Century incorporated by reference its rule making petition in which, among other things, it argued that Wolfforth is a community and is independent from the Lubbock Urbanized Area. In his reply, Shubert is responding to the issue of whether Wolfforth is independent of Lubbock and to Macha's proposed allotment of Channel 240C3 at Littlefield. Both of these issues were within the scope of 21st Century's and Macha's comments. Therefore we will deny 21st Century's motions to dismiss Shubert's reply comments.

⁴ 21st Century also filed motions to dismiss two supplemental pleadings that Shubert filed on August 21, 1996, and November 8, 1996, contending that the pleadings are unacceptable because they were filed after the pleading cycles ended in this proceeding. We will deny the motions to dismiss and accept the pleadings because the pleadings were accompanied by requests for late acceptance and because they bring to the staff's attention changed circumstances that have occurred since the filing periods ended in this proceeding -- *i.e.*, statements made by 21st Century in applications to extend its construction permit for the Littlefield station. Since these statements were made in Commission filings, we can also take official notice of them.

community to another community that was located closer to but outside of an Urbanized Area. Our new policy requires that proponents seeking to relocate to a community adjacent to an urbanized area that would place a 70 dBu signal over 50% or more of the urbanized area must submit a Tuck analysis. See Headland, Alabama and Chattahoochee, Florida ("Headland, Alabama), 100 FCC Rcd 10352 (1995).⁵ In this case, our engineering staff determined that the reallocation of Channel 238C3 would provide a 70 dBu signal to half of the Lubbock Urbanized Area. The RSI requested 21st Century to direct its response to the factors for determining independence as enumerated in KFRC and Tuck to determine whether Wolfforth warrants a first local service preference.⁶

5. In response, 21st Century contends that, based on its engineering analysis, the predicted 70 dBu signal for KAIQ(FM) at Wolfforth will encompass only 45.4% of the Lubbock Urbanized Area, and thus the showing required pursuant to Headland, Alabama is not applicable.

In any event, 21st Century has submitted information, using the criteria set forth in KFRC and Tuck, regarding the independence of Wolfforth from the Lubbock Urbanized Area. 21st Century argues that the first criterion, signal population coverage, is not relevant in this case since less than half the Lubbock Urbanized Area will be served by Station KAIQ(FM). As to the second criterion, it maintains that Wolfforth is a sizeable rural community with 1,941 people while Lubbock contains approximately 186,206 people. 21st Century states that Wolfforth is located approximately eight kilometers outside of the city limits of Lubbock, separated by open rural area and farm land. As to the third criteria concerning the interdependence between the smaller community and the central city, 21st Century submits that Wolfforth has its own local government, elected officials, zip code, its own section in the GTE phone book, Chamber of Commerce, and a separate advertising market.⁷ 21st Century also submits that many residents work in Wolfforth, noting its phone book lists over one hundred individual businesses within the city itself. Wolfforth maintains its own city financed police department and a fifteen-member volunteer fire department. 21st Century reports that the city provides water and sewer services to its residents.

⁵ See also Huntington Broadcasting, Company v. FCC, 192 R.2d 33 (D.C. Cir. 1951); RKO General, Inc. ("KRFC"), 5 Fcc Rcd 3222 (1990), and Faye and Richard Tuck ("Tuck"), 3 FCC Rcd 5374 (1988).

⁶ KFRC and Tuck clarified the type of evidence considered in determining whether a suburban community should be denied a first local service preference. First, the Commission examines "signal population coverage", *ie.*, the degree to which the proposed station could provide service not only to the suburban community but to the adjacent metropolis as well; second, the size and proximity of the suburban community relative to the adjacent city; and third, the interdependence of the suburban community with the central city.

⁷ Rick McWhorter, Mayor of the City of Wolfforth, filed a letter supporting 21st Century's proposal to bring a radio station to the community. Mr. McWhorter states that Wolfforth is a city of approximately 2400 residents located outside the city limits of Lubbock and is separated from Lubbock by agricultural and suburban developments. He confirms 21st Century's submissions regarding the various services, facilities and form of government that are available in the community.

With respect to other municipal services, it states that Wolfforth has its own independent school district with 4,000 students, a city library, city park and a new municipal building which houses the city administrative offices. 21st Century urges, on the basis of the information presented, that even though the city is somewhat physically close to Lubbock, the application of the Tuck factors to Wolfforth clearly determines the independence of Wolfforth from Lubbock, and Wolfforth deserves to receive its first local service.

6. Shubert filed comments opposing 21st Century's proposal and contends that Wolfforth should not be awarded a first local service preference. He argues that Wolfforth is clearly interdependent with Lubbock, which has a plethora of local broadcast outlets already. In this regard, he notes that the Commission has "consistently given little or no weight to claimed first local service preferences if, given the facts and circumstances, the grant of a preference would appear to allow an artificial or purely technical manipulation of the Commission's 307(b) related policies" citing, Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License ("Community of License R&O"), 4 FCC Rcd 4870 (1989), recon. granted in part, 5 FCC Rcd 7094, 7096 (1990) ("Community of License MO&O"). He contends that Wolfforth does not qualify as an independent community from the Lubbock Urbanized Area using the factors for determining independence as enumerated in KFRC and Tuck. Shubert claims petitioner's proposed facility would place a 1 mV/m signal over the entirety of Lubbock. Second, Wolfforth is dwarfed by nearby Lubbock, a city almost one hundred times its size that is only three miles away. Shubert argues that Wolfforth is clearly an integral part of the Lubbock metropolitan area, noting that the community has no airport, hospital, newspaper or local media that is distinct from Lubbock. He claims that Wolfforth's advertising market and political identity is indistinguishable from Lubbock. Shubert also advises that Wolfforth city employees confirmed that at least half of its residents commute to Lubbock, that there are not intracity transportation services, and commercial bus lines do not pick up passengers in Wolfforth. In contrast, Shubert describes Littlefield as an independent city with its own local government, school district, police and fire department, municipal airport, post office, banks, hospital, newspaper and many businesses. Shubert states the Commission should not allow 21st Century to abandon its commitment to construct a Littlefield station in search of a more populous market in the Lubbock suburbs. He maintains that 21st Century has filed for extension of its Littlefield permit, claiming that circumstances beyond its control had delayed construction. However, Shubert believes these circumstances are simply 21st Century's own voluntary attempts to reallocate its station to the Lubbock suburbs. Shubert maintains that the Commission should not endorse this "artificial or purely technical manipulation" of its rules and policies, citing Community of License MO&O. He further advises that in a case presently pending before the Commission involving 21st Century, the Commission indicated that the "theoretical" nature of the service lost to a small community may still offset the equally theoretical "gain" to an already well-served suburb of an urbanized area. See Sibley, Iowa and Brandon, South Dakota, 11 FCC Rcd 3635 (1996). Shubert believes adoption of 21st Century's proposal is inconsistent with the principles of bringing service to outlying communities underlying Section 307(b) of the

Communications Act.

7. Discussion At the outset, it is necessary to dismiss Macha's proposal to allot Channel 240C3 to Littlefield. In doing so, we recognize that the allotment of Channel 240C3 to Littlefield could replace some of the potential loss of service at Littlefield; however it is Commission policy not to accept a proposal that is contingent upon final approval of changes involving other broadcast facilities. See Cut and Shoot, Texas, 11 FCC Rcd 16383 (1996). In this case, Channel 238C3 must be allotted to Wolfforth in order to accommodate Channel 240C3 at Littlefield. Furthermore, we find Macha's proposal is beyond the scope of this proceeding and, it would, therefore, violate the Administrative Procedure Act to allot Channel 240C3 to Littlefield. While it is well established that a final rule may vary from what was originally proposed, see Cleveland and Ebenezer, Mississippi, 8 FCC Rcd 8654 (1993) recon. denied, 10 FCC Rcd 8807 (1995), and Southampton, Bridgehampton, Westhampton and Calverton-Roanoke, New York, 7 FCC Rcd 4412 (1992), appl. for rev. denied, 10 FCC Rcd 11516, (1995), we cannot allot Channel 240C3 when we explicitly stated in the Notice that we were not proposing to do so.

8. Having made that decision, we can now address the merits of 21st Century's reallocation proposal. In doing so, we have confirmed 21st Century's engineering study that Channel 238C3 at Wolfforth will place a 70 dBu signal over less than 50% of the Lubbock, Texas, Urbanized Area. Thus, this case does not present the policy concerns expressed in Headland, supra. Nevertheless, an examination of the Tuck factors supports a finding that Wolfforth is sufficiently independent of Lubbock so that the transmission services licensed in the Lubbock Urbanized Area should not be attributed to Wolfforth. As already noted, Station KAIQ(FM) will place a 70 dBu signal over less than 50% of the Lubbock Urbanized Area. As for size and proximity, Wolfforth has a 1990 census population of 1,941 persons and is about eight kilometers from the edge of the Lubbock Urbanized Area ("population 187,906")⁸. As to the third criteria of interdependence, we find that Wolfforth is not dependent upon the Urbanized Area for its existence. Wolfforth is an incorporated community with a mayor and city council. 21st Century has provided a letter from Wolfforth's Mayor affirming that the city provides its own municipal services to its citizens such as police and fire protection, EMS medical service, water, trash, and sewer services. In addition, the mayor states the city has a new municipal building which houses the police department, municipal court, and the city library. The city also has its own independent school system and city park which includes a four-field baseball complex, basketball courts, a sand volleyball court, soccer and football areas, a lake, playground and picnic areas. The telephone listings for Wolfforth are published by the GTE Southwest Incorporated. While listings for other communities are included in the same telephone book, the listings for Wolfforth, are separate from the other communities and Lubbock is not a part of the telephone book. Wolfforth also has its own post office and zip code, separate from that of Lubbock. Wolfforth also has numerous businesses, religious and civic organizations which identify

⁸ All population figures are taken from the 1990 U.S. Census.

themselves with the community as is evidenced by the listings in the telephone. While Shubert points out that the community has no airport, hospital or newspaper, we find that on balance that Wolfforth should be treated as a separate community.

9. Next, we must determine whether the instant proposal would result in a preferential arrangement of allotments pursuant to the Commission's change of community procedures. See Community of License MO&O, supra, and Revision of FM Assignment Policies and Procedures.⁹ Based on past precedent, we would normally favor a first local service to Wolfforth over retaining a second local service at Littlefield. However in this case, we find that the reallocation of Channel 238C3 from Littlefield to Wolfforth and the modification of Station KAIQ(FM)'s authorization would not be in the public interest. In making this determination, we find that retaining Channel 238C3 at Littlefield would trigger priority two of the Commission's FM allotment priorities because, based upon our engineering analysis, 3,113 persons would receive a second full-time aural service if the station were built.¹⁰ By way of contrast, the proposed reallocation of Channel 238C3 from Littlefield to Wolfforth triggers priority 3 since Wolfforth (population 1,941) would be provided with its first local aural transmission service. Since priorities 2 and 3 are co-equal, the tie-breaking mechanism is population.¹¹ Using this criterion, we note that the number of people that could receive a second aural service (3,113) is greater than the population of Wolfforth (1,941), which would receive a first local transmission service. Under these circumstances, we believe that the public interest is better served by providing a second reception service to a larger population than providing a first local aural transmission to Wolfforth. Moreover, all the residents of Wolfforth receive service from five or more full-time aural services. Our view is further buttressed by the fact that 411 persons will receive a first aural reception service, thereby eliminating a white area.¹² Based on our decision, we need not delete Channel 237A, Tahoka, Texas, or in the alternative substitute Channel 278A for Channel 237A at Tahoka to accommodate 21st Century's reallocation proposal. We will serve a copy of this Report and Order on the applicant for Channel 237A at Tahoka. We also find that the issue raised by Shubert concerning 21st Century's reason for not building a station at Littlefield is speculative and that there is no extrinsic evidence to support this allegation, which is now moot.

10. Accordingly, IT IS ORDERED, That the petition for rule making submitted by 21st

⁹ The FM allotment priorities are: (1) first full-time aural service; (2) second full-time aural service; (3) first local service; and (4) other public interest matters. [Co-equal weight is given to priorities (2) and (3).]

¹⁰ We note that 21st Century's rulemaking petition acknowledges that 2,714 people in an area of 464 square kilometers would receive a second aural reception service from Channel 238C3 at Littlefield. See 21st Century's petition, Figure 9 of engineering exhibit.

¹¹ See Bowdon, Griffin, Hogansville, and Sparta, Georgia, 6 FCC Rcd 4863 (1991).

¹² A "white area" is an area in which there are presently no full-time aural services.

Century Radio Ventures, Inc., to reallocate Channel 238C3 from Littlefield to Wolfforth, Texas, IS DENIED.

11. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this Report and Order by Certified Mail, Return Receipt Requested, to the following:

Albert Benavides
4821 73rd Street
Lubbock, Texas 79424
(Applicant for Channel 237A at Tahoka, Texas)

12. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

13. For further information concerning this proceeding, contact Pam Blumenthal, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau